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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 715

ANTHONY WILKO, PETITIONER

v.

JOSEPH E. SWAN, ET AL., INDIVIDUALLY AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HAYDEN STONE AND CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF PETITION

The Solicitor General submits this brief on behalf of the Securities and Exchange Commission, *amicus curiae*, in support of the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 40-49) is reported in 201 F. 2d 439. The opinion of the District Court (R. 23-32) is reported in 107 F. Supp. 75.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1953 (R. 52). The petition for a writ of certiorari was filed on April 14, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. See also Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a).

QUESTION PRESENTED

Whether an agreement to arbitrate a cause of action arising under the civil liabilities provisions of Section 12(2) of the Securities Act of 1933, obtained by a securities firm from a customer at the initiation of their dealings, is valid and enforceable in view of the purpose of Congress to make available to a defrauded purchaser of securities the simple and effective court remedy provided by Section 12(2) encompassing litigation advantages which may not be afforded or safeguarded in an arbitration proceeding, and in view of the provisions of Section 14 of said Act invalidating agreements to waive compliance with the statute.[1]

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[1] The determination below also presents the question whether the provisions of the Federal Arbitration Act for vacating an award (9 U.S.C. § 10) authorize a court to compel compliance with an arbitration agreement which (as construed by the court below) requires that the arbitrators abandon their normal functions and conduct the equivalent of a court proceeding. The Commission, however, has no distinct statutory interest in the proper construction of the Federal Arbitration Act, and discusses this question only to the extent that it is pertinent to the principal question set forth in the text.

STATUTES INVOLVED

The following are the pertinent provisions of the Securities Act of 1933:

Section 12(2), 15 U.S.C. § 771(2):

> Any person who—
>
> * * * * *
>
> (2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

> Any condition, stipulation, or provision binding any person acquiring any security to

waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

Section 22(a), 15 U.S.C. § 77v(a):

The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. * * *

The Federal Arbitration Act provides:

9 U.S.C. § 3:

If any suit or proceeding be brought in any of the courts of the United States upon

any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 10:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * * * *

STATEMENT

Petitioner charged in his complaint that, on or about January 17, 1951, respondents sold him 1,600 shares of the common stock of Air Associates, Inc., for $29,517.24, by means of misrepresentations of material facts and omissions to state material facts necessary to make various representations not misleading. Respondents are the partners of Hayden, Stone & Co., a New York securities firm. Haven B. Page, a director and counsel of Air Associates and whose stock allegedly was sold, is also a defendant. Claiming to have suffered a loss of $3,888.88 as a result of respondents' misrepresentations when he sold the stock two weeks later, petitioner brought this action under the civil liabilities provisions of Section 12(2) of the Securities Act of 1933 to recover that amount. (R. 2-4.)

Without answering the complaint, respondent Hayden, Stone & Co. moved for a stay pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, and submitted an affidavit which disclosed that on May 2, 1950, apparently in connection with an earlier unrelated transaction, and again on January 18, 1951, in connection with the instant sale, petitioner had signed a form "Margin Agreement" which this firm used in its dealings with its customers (R. 7-10). The form agreement is reproduced in larger type in six pages of the Transcript of the Record (pp. 11-16); but the document attached to the affidavit was a fine print form, approximately 8½ by 11 inches, containing on one side of the page numerous provisions respecting the rights and liabilities of the parties.

The seventeenth paragraph of this printed form contains the following provision for arbitration (R. 16, 22):

> Any controversy arising between us under this contract shall be determined by arbitration pursuant to the Arbitration Law of the State of New York, and under the rules of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or of the American Arbitration Association, or of the Arbitration Committee of the New York Stock Exchange or such other Exchange as may have jurisdiction over the matter in dispute, as I may elect. Any arbitration hereunder shall be before at least three arbitrators.

Among the other provisions is one (apparently dealing with business and technical questions) which states that all transactions effected on the customer's behalf are subject to the constitutions, rules, customs and practices of the exchanges or markets where executed and of their respective clearing houses, and to "the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereof or supplemental thereto", and to applicable rules and regulations of the Securities and Exchange Commission (R. 11, 17).

Elsewhere in the form agreement is a paragraph in which respondents purportedly are exculpated from liability for any misrepresentations made by them, or by their agents or employees, in the sale or purchase of securities (R. 14, 20).

The contract for the sale of the stock was a separate agreement (R. 26).

District Judge Goddard denied respondents' motion for a stay pending arbitration. The arbitration agreement obtained by respondents "as a preliminary to the purchase of stock," he ruled, conflicted with the Securities Act of 1933 in attempting to deprive petitioner of the advantageous court remedy which Congress intended to afford a defrauded purchaser under Section 12(2) of that Act. Moreover, he held, it amounted to a waiver of compliance with the statute and was therefore rendered void by Section 14 of the Act. (R. 23-32.)

A divided Court of Appeals reversed the order of the District Court (R. 40-52). The majority of the court (Judges Swan and Chase), although observing that the "question is not free from doubt" (R. 49), ultimately concluded that the Securities Act of 1933 did not prohibit a securities firm from obtaining a pre-sale or pre-controversy agreement for the arbitration of any cause of action, including the statutory action for fraud or misrepresentation which a customer may later have reason to assert. The majority held, accordingly, that the stay provisions of the Federal Arbitration Act (9 U.S.C. § 3) were applicable (R. 41-49).

Judge Clark wrote a dissenting opinion in which he expressed the view that, under the ruling of the majority, "important rights under this notable first of a series of famous Acts for the benefit of the investing public [would] be capable of nullifica-

tion by long fine-print restrictions of the broker's devising" (R. 52).

The Securities and Exchange Commission participated as *amicus curiae* in the proceedings in both courts below in opposition to the motion to stay the court action and compel arbitration.

SPECIFICATION OF ERROR TO BE URGED

While petitioner has assigned a sizeable list of errors, the interest of the Commission as *amicus curiae* extends only to the following:

The majority of the Court of Appeals erred in holding that the pre-sale agreement for compulsory arbitration is valid and enforceable against the petitioner customer in a subsequent action for fraud in the sale of securities brought against the respondent securities firm pursuant to Section 12(2) of the Securities Act of 1933.

REASONS FOR GRANTING THE WRIT

I

Upon what it regarded as a close question of statutory construction—and one of great importance to the investing public—the majority below reached a decision which opens the door to nullification of important rights under the Securities Act of 1933 which Congress intended to afford public investors. The question is whether the Securities Act of 1933 permits a securities firm to resort to a pre-sale or pre-controversy arbitration agreement in order to avoid court actions under the civil liabilities provisions of that statute which may be in-

stituted by customers who believe that they have been defrauded. We show below that arbitration cannot assure the customer the equivalent of his statutory rights. As Judge Clark aptly observed in his dissent, the majority of the Court of Appeals ignored the realities of the relationship between the professional securities firm and the ordinary customer in holding that the petitioner customer had effectively waived his statutory choice of remedies by executing the form agreement prior to the transaction which gave rise to his asserted cause of action. While the stipulation here in question was exacted by a broker-dealer in connection with the opening of an account, the decision below may well suggest exaction of similar stipulations for arbitration by issuers and underwriters who desire to avoid lawsuits under the companion civil liabilities provisions of Section 11 of the Act, 15 U.S.C. § 77k, on account of misrepresentations or omissions in registration statements.

The majority below described the opinion of the District Court as "carefully reasoned" (R. 43), and one which "presents a strong argument against the conclusion we have reached" (R. 49). It agreed also that the Commission's *amicus curiae* brief had made a "strong presentation" in support of the decision of the District Judge (R. 43). Conceding that "the question is not free from doubt" (R. 49), it determined nevertheless, to resolve that doubt against the interests of the investing public which the Securities Act of 1933 was designed to protect. The minority opinion of

Judge Clark expressed high regard for commercial arbitration as a method of "bringing a businessman's adjudication to business questions" (R. 49-50). "But", Judge Clark cautioned, "it would be vastly unfortunate if it became usable as a device to blunt or break social legislation" (R. 50). In his view, the majority has sanctioned such a device; and his opinion sets forth reasons why "what is most desirable in the ordinary arbitration becomes a clear loss of statutory right here" (R. 51). Unless reversed by this Court, the ruling will be *stare decisis* in the circuit containing the nation's largest financial community and the hub of the country's securities industry. Review by this Court, we suggest, is clearly desirable in the public interest.

II

In enacting Section 12(2) and the other civil liabilities provisions of the Securities Act of 1933, Congress intended to afford defrauded customers litigation advantages which were necessary for their protection but which were not considered unfair to the securities industry. The heavy burden imposed upon a plaintiff in a common law action for fraud and deceit arising out of a securities transaction convinced Congress that a simpler and more effective court remedy was needed.[2] Section 12(2) is part of a statutory scheme which resulted from the conclusion of Congress that securities are "intricate merchandise",[3] and that the public in-

[2] The common law remedies, however, were preserved by Section 16 of the Act, 15 U.S.C. § 77p.

[3] H. Rep. No. 85, 73d Cong., 1st Sess. (1933), p. 8.

terest demanded legislation which would recognize the gross inequality of bargaining power between the professionals in the securities business and the average investor. The Act was passed in response to a Presidential message urging that there be added to the ancient rule of *caveat emptor* the further doctrine "let the seller also beware",[4] and the reports of the congressional committees recognize this important goal.[5]

Under Section 12(2), the burden of proof is shifted to the defendant seller who must prove "that he did not know, and in the exercise of reasonable care could not have known, of [the] untruth or omission." The legislative history discloses that Congress recognized that, as a practical matter, if more than mere "paper liability" was to be imposed upon fraudulent vendors of securities, "it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission" on the seller. "To impose a lesser responsibility", it was felt, "would nullify the purposes of this legislation." H. Rep. No. 85, 73d Cong., 1st Sess. (1933), pp. 9-10. In 1934, when Congress enacted some alleviating amendments with respect to Section 11, it left Section 12(2) untouched.[6]

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[4] *Id.*, at 2.

[5] *Ibid.*; S. Rep. No. 47, 73d Cong., 1st Sess. (1933), pp. 6-7.

[6] For a detailed discussion, see Loss, *Securities Regulation* (1951), pp. 1011-1029. The advantage of the Section 12(2) remedy over the common law action for fraud and deceit is illustrated by *Murphy* v. *Cady*, 30 F. Supp. 466 (D. Maine), affirmed, 113 F. 2d 988 (C.A. 1), certiorari denied, 311 U.S. 705, where the court dismissed the common law count of the complaint but sustained the statutory action on the same allegations of fact.

The statute also affords the defrauded purchaser a broad choice of forum. He may sue in any court of competent jurisdiction—federal or state. If he sues in a state court, the action cannot be removed to a federal court; and if he elects to sue in a federal court he has a broad choice of venue, with the privilege of nation-wide service of process, and he need not comply with the $3,000.00 requirement of diversity cases. See Section 22(a).[7]

That Congress intended this civil remedy to be always available to a customer who finds that he has been defrauded is made clear by the aforementioned legislative history, and by the anti-waiver provisions of Section 14 of the Act. The latter expressly state that any "stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title * * * shall be void." The decision below gives effect to a stipulation, exacted at the very initiation of the customer's dealings with the securities firm, pursuant to which the customer waives his right, in the event of a fraudulent sale, to elect the remedy provided by Section 12(2) and the consequent choice of forum and shift in the burden of proof. In our opinion, this involves to a very material degree a waiver of "compliance" with the statute.

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[7] *Cf. Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 266, where the Court regarded the choice of venue granted by Section 6 of the Federal Employers' Liability Act as so "substantial" that a stipulation restricting that choice was held invalid as a "device" which "would thwart the express purpose of the Federal Employers' Liability Act."

The majority below, however, found it "far from clear that the words 'waive compliance with' refer to anything more than the mandatory or prohibitive provisions of the Act." It observed: "The means of enforcement provisions, on the other hand, seem clearly permissive, not requiring compliance" (R. 47). Section 14, of course, refers to "any provision of" the Act. To construe the section as voiding only attempted waivers of compliance with the substantive provisions of the Act, such as the prohibitions against fraud and misrepresentation, rather than the remedial provisions, runs counter to the purpose of the statute. Moreover, to the extent that enforcement of the substantive requirements of the Act is dependent upon the effectiveness of the private remedies afforded, the view of the majority below can only tend to undermine compliance with the substantive provisions as well. See H. Rep. No. 85, 73d Cong., 1st Sess. (1933), pp. 9-10, *supra*, p. 12. Thus, if an investor, in advance of his dealings with a securities firm, may be induced to contract away all of his remedial rights under the Act, the obvious consequence is to render nugatory those remedies and to make compliance with the substantive provisions dependent exclusively upon the criminal and injunctive sanctions. The opinion of the Court of Appeals does not go that far; for the waiver of compliance permitted below contemplated the substituted remedy of arbitration. If, however, the language "waive compliance with any provision of this title" is not construed to cover waiver of the statutory remedies, there appears no

logical stopping place short of complete evisceration of those remedies.

On the other hand, if the quoted language does cover remedies, we believe that it necessarily preserves all of the public investor's remedies under the statute, and forbids any of them to be bargained away in advance of the transaction giving rise to the customer's claim. In that respect it is immaterial whether the consideration for the waiver be the substituted procedure of arbitration, a stipulation for liquidated damages of a lesser amount than that provided by the statute, or something else. The majority below suggested that Congress would have included a specific prohibition against arbitration in Section 14 had it intended that provision to have such broad coverage. Congress has seen fit, however, to cover the matter of waivers by a single broadly worded prohibition rather than by particularization of specific types of waivers. *Cf. Jefferson Lake Sulphur Co.* v. *Walet*, 104 F. Supp. 20 (E.D. La.), affirmed, *Walet* v. *Jefferson Lake Sulphur Co.*, C.A. 5, March 11, 1953, CCH Fed. Sec. L. Rep. ¶ 90,616.[8] See also *S.E.C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350.

The majority concluded that its interpretation involved no conflict with the policy or purpose of

[8] The same anti-waiver language in Section 29(a) of the companion Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), was held in that case to make it "crystal clear" that any waiver of the right of a corporation to maintain an action under Section 16(b) of that statute, 15 U.S.C. § 78p(b), to recover the "short" term" trading profits of a corporate insider, would be void (104 F. Supp., at 23-24).

the Securities Act of 1933 (R. 46-49).[9] Assuming it to be conceded that the customer could enter into a binding stipulation to arbitrate or settle his claim out of court after a cause of action arose, it held that a pre-sale or pre-controversy stipulation presented no different question. However, since the Act accords the defrauded customer an election between his statutory and common law remedies, and gives him also a choice of forum, it is arguable that it would not be inconsistent with the purpose of the statute if the customer were permitted to elect to have an existing claim for violation of his substantive rights determined by arbitration rather than by court action. The Commission took no position on this question in the court below and we take none here. We suggest only that if post-con-

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[9] Apart from the express anti-waiver provisions of Section 14, conflicting public policy, whether determined by the court or the legislature, is sufficient in itself to invalidate an arbitration agreement. See, *e.g.*, *The Anaconda* v. *American Sugar Refining Co.*, 322 U.S. 42, 46 ("* * * a party cannot stipulate away * * * jurisdiction which the legislation declares open * * *."); *Kingswood Management Corp.* v. *Salsman*, 272 App. Div. 328, 70 N.Y.S. 2d 692, 693 ("The Emergency Price Control Act was adopted from urgent reasons of public policy which the Congress did not intend to turn over to private arbitrators to administer"). See also *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 F. 2d 184 (D. Del.); *Hill* v. *Hill*, 199 Misc. 1035, 104 N.Y.S. 2d 755 (Sup. Ct.); *Swislocki* v. *Spiewak*, 273 App. Div. 768, 75 N.Y.S. 2d 147.

Of course, the fact that the cause of action asserted may be statutory in origin does not necessarily mean that public policy forbids arbitration. Agreements to arbitrate actions under the Miller Act and Fair Labor Standards Act of 1938, for example, have been regarded as presenting no conflict with the policies of those statutes. See *Agostini Bros. Building Corp.* v. *United States*, 142 F. 2d 854 (C.A. 4); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C.A. 3), certiorari denied, 327 U. S. 777; *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (C.A. 3).

troversy agreements to arbitrate are valid, they fall into the category of other post-controversy arrangements which may limit plaintiff's course of action, such as the decision to waive a jury trial, or perhaps to accept a compromise settlement of the claim. We submit that the court below erred in assuming that there can be no substantial distinction between a pre-controversy and a post-controversy stipulation to waive compliance with the remedial provisions of the statute. The grant of latitude for reasonable post-controversy agreements may very well be consistent with the realistic effectuation of the purpose of Congress to afford the investor a choice of remedies.

On the other hand, to uphold the pre-controversy stipulation enables the professional in the securities business to strip the investor of the protection of the statute. Contrary to the purpose of Congress, the decision below has given no recognition to the grossly unequal positions of the securities firm and the average customer who, before effecting a purchase, is requested to sign a fine-print form agreement. A persuasive analogy on this point is mentioned in Judge Clark's minority opinion—*viz.*, the decisions of this Court which give no validity, under the Federal Employers' Liability Act, to releases obtained prior to an accident, but recognize them if fairly and reasonably made in settlement of an existing claim (R. 52).[10] As Judge Clark noted, however, the

[10] See, *e.g.*, *Callen* v. *Penna. R. R.*, 332 U. S. 625, 631; *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 266.

validity of a post-controversy stipulation is not now before the Court.

District Judge Goddard and Circuit Judge Clark correctly pointed out that arbitration could not assure a customer the equivalent of his statutory rights. As Judge Learned Hand has stated, in arbitration the parties "must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery."[11] Commercial arbitration is designed to obtain a businessman's decision of a business question. The arbitrators would be selected by the regulated industry,[12] and would ordinarily be laymen who would hear and decide the claim without reference to technical rules of law and procedure.[13] There is no assurance that the arbitrators would or could correctly apply the rules of procedure, the principles of evidence, the substantive law of fraud and misrepresentation, the statutory burden of proof, and the correct measure of damages. There is no assurance, moreover, that lay arbitrators would not be influenced in some degree by the exculpatory provision of the margin agreement which is concededly invalid. Finally, as the dissenting judge observed, it is improbable

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[11] *American Almond Products Co.* v. *Consolidated Pecan Sales Co., Inc.*, 144 F. 2d 448, 451 (C.A. 2).

[12] See, *e.g.*, Art. VIII, Sections 4 and 6, of the Constitution, and Rule 754 of the Rules of the Board of Governors of the New York Stock Exchange.

[13] See *Handbook and Guide to Arbitration under the New York and United States Arbitration Statutes*, issued by the Chamber of Commerce of the State of New York (1932), pp. 4-6.

that industry arbitrators would give "the customer that objective and sympathetic consideration of his claim which is envisaged by the Securities Act" (R. 50).

III

The majority of the Court of Appeals was not unconcerned with these dangers. It felt, however, that they would be avoided in this case because (1) it construed the margin agreement to require, by implication, that the arbitrators apply the provisions of the Securities Act of 1933, and (2) it considered that, therefore, a decision by the arbitrators not reached in conformity with Section 12(2) could be vacated by the court under Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10. The majority, however, gave no consideration to the various arbitration associations' rules expressly adopted by the margin agreement with which a simulated court trial would appear to conflict.[14]

While we assume that an award which expressly relied upon the invalid exculpatory clause in the margin agreement could be set aside,[15] the pos-

[14] Thus, the rules of the American Arbitration Association provide that "the arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." Rule 30 of the Commercial Arbitration Rules.

[15] *Cf. Evans* v. *Hudson Coal Co.*, 165 F. 2d 970 (C.A. 3), where the court prescribed a wage formula for the guidance of the arbitrators so that their award might not later be set aside as based upon a formula rendered illegal by the Fair Labor Standards Act. The requirement that arbitrators make mathematical computations in conformity with such formula, of course, falls within the normal functions of lay arbitrators.

sibility of judicial review of an award does not permit the court to exercise supervision of the entire arbitration process so as to assure the customer the equivalent of a trial by a "court of competent jurisdiction" [Section 12(2) of the Securities Act], including enforced adherence to the statutory shift in the burden of proof. The contrary assumption of the majority below appears to us to ignore the realities of the situation, as the dissenting opinion shows (R. 50-51). Moreover, since the suggestion concerning possible judicial supervision of the whole arbitration process is contrary to the views of other courts of appeals,[16] and those of the Court of Appeals for the Second Circuit in other cases,[17] there is no assurance that even the limited safeguards which the majority below suggests should be afforded through judicial super-

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[16] See, *e.g.*, *Donahue* v. *Susquehanna Collieries Co.*, 160 F. 2d 661, 664 (C.A. 3) (district judge may not "supervise and control" the arbitration proceeding by directing findings on specified questions); *United Fuel Gas Co.* v. *Columbian Fuel Corp.*, 165 F. 2d 746, 751 (C.A. 4) (had the arbitrators misinterpreted the contract or considered improper evidence "this would not vitiate the award").

[17] See *American Almond Products Co.* v. *Consolidated Pecan Sales Co.*, 144 F. 2d 448, 451 (award confirmed despite plaintiff's failure to submit evidence on amount of damages; arbitrators may have determined amount by own expert knowledge and experience; when parties choose to arbitrate "they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid"); *James-Richardson & Sons, Ltd.* v. *W. E. Hedger Trans. Co.*, 98 F. 2d 55, 57, certiorari denied, 305 U. S. 657 (court has no "power to amend or overrule merely because of disagreement with matters of law or fact determined by the arbitrators"); *In re Canadian Gulf Line, Ltd.*, 98 F. 2d 711, 714 (arbitration tribunal's "extensive powers" are subject to "most restricted review"). See also *Karppinen* v. *Karl Keifer Machine Co.*, 187 F. 2d 32, 34.

vision and review of the results of arbitration will be recognized elsewhere, or, for that matter, recognized in the court below when an award is actually challenged.

Instead of assuring the customer his statutory rights, including that of having the burden of proof shifted to the seller, the decision below imposes upon the customer the burden of proving, as a prerequisite to having an adverse award vacated, that the arbitrators did not comply with the requirements of the Securities Act.[18] This provides further evidence that the procedure sanctioned below is not an adequate substitute for the remedy afforded by the Securities Act. It illustrates, also, the lack of warrant for the majority's assumption that arbitration will be more "speedy" (R. 47); for, as the dissent aptly stated, "no matter how time consuming may be the arbitration itself, [under the majority's view] it must necessarily be succeeded by lengthy judicial proceedings before the award is legally enforceable" (R. 51). The arbitration award might then very well become the "commencement, not the end, of [the] litigation."[19]

CONCLUSION

The decision below presents a question as to the proper construction of the civil liabilities and anti-waiver provisions of the Securities Act of 1933

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[18] *American Almond Products Co.* v. *Consolidated Pecan Sales Co., Inc.*, 144 F. 2d 448, 450 (C.A. 2).

[19] *Burchell* v. *Marsh*, 58 U.S. 344, 349.

which is of great importance to the investing public. For the reasons stated, we believe that the decision is erroneous, frustrates the policy of the Securities Act, and opens the door to nullification of important rights which Congress intended to afford public investors. Review by this Court seems clearly desirable in the public interest.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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